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Kevin M. McCann, Chief
(Analytical Communications Branch)
Trade and Commercial Regulations Branch,
Regulations and Rulings,
Office of Trade
U.S. Customs and Border Protection,
90 K Street, N.E., 10th Floor,
Washington, DC 20229-1177

Re: **Investigation of Claims of Evasion of Antidumping and Countervailing Duties; *Interim Regulations; solicitation of comments*; USCBP-2016-0053**

Dear Chief McCann,

The Southern Shrimp Alliance ("SSA") is submitting written comments regarding the interim rules, effective August 22, 2016, implemented by U.S. Customs and Border Protection ("CBP") pursuant to Title IV of the Trade Facilitation and Trade Enforcement Act ("TFTEA"), known as the Enforce and Protect Act of 2015 ("EAPA"). As set forth in the Federal Register Notice announcing those interim rules, these comments are timely filed.[1]

SSA is a non-profit alliance of shrimpers, dockside facilities, processors, retailers, distributors, and other industry participants committed to preventing the continued deterioration of America's warmwater shrimp industry and to ensuring the industry's future viability. SSA's membership spans the coast of the South Atlantic and the Gulf of Mexico, encompassing North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.

SSA submits these comments to request that CBP amend the *Interim Regulations* to promote the publication and dissemination of actions, administrative determinations, and findings made by the agency related to its EAPA proceedings.

[1] See Investigation of Claims of Evasion of Antidumping and Countervailing Duties, 81 Fed. Reg. 56,477 (Dep't Homeland Security and Dep't of the Treasury August 22, 2016) ("*Interim Regulations*").

The *Interim Regulations* establish that CBP may take all or some of the following actions in the course of an EAPA investigation:

- Provide "an acknowledgement of receipt of an allegation containing all the information and certifications required in § 165.11, together with a CBP-assigned control number, to the party that filed the allegation." (19 C.F.R. § 165.12(a));

- In circumstances where CBP has determined not to initiate an investigation, "notify the interested party who filed the allegation within five business days of that determination," (19 C.F.R. § 165.15(d)) with the decision as to whether to initiate made 15 business days from the date of receipt of a complete and properly filed allegation (19 C.F.R. § 165.12(a));

- In circumstances where CBP has determined to initiate an investigation, "issue notification of its decision to initiate an investigation to all parties to the investigation no later than 95 calendar days after the decision has been made . . . ." (19 C.F.R. § 165.15(d)(1));

- Where CBP determines to take interim measures based on a finding that there is a reasonable suspicion that an importer entered covered merchandise into the customs territory of the United States through evasion, the agency "will issue notification of this decision to the parties to the investigation within five business days after taking interim measures." (19 C.F.R. § 165.24(c));

- After making a final determination as to whether, based on substantial evidence, covered merchandise was entered into the customs territory of the United States through evasion, "CBP will send via an email message or through any other method approved or designated by CBP a summary of the determination limited to publicly available information . . . to the parties to the investigation" no later than five business days after making the determination (19 C.F.R. § 165.27(c)); and

- In response to a request for an administrative review of the final determination, the Office of Regulations and Rulings will issue a final administrative determination that "will be in writing and will set forth the conclusion reached on the matter," with this conclusion being "transmitted electronically to all parties to the investigation." (19 C.F.R. § 165.46(a)).

Of these six potentially different agency actions, one will be conveyed only to a party filing an allegation (19 C.F.R. § 165.12(a)), while the remainder will be communicated only to the parties to the investigation. Pursuant to 19 C.F.R. § 165.1, the definition of "parties to the investigation" is sharply limited. Where an EAPA investigation was initiated based on an allegation, "parties to the investigation" encompasses only the interested party that filed the allegation and the importer who allegedly engaged in evasion. Where an EAPA investigation was initiated based on a

request from another federal agency, only the importer allegedly engaged in evasion is included within the definition of "parties to the investigation."

In short, CBP's *Interim Regulations* appear to establish an administrative proceeding structure that contains no general public notice element of the agency's actions. By declining to provide for the publication of agency actions, CBP is severely undermining the prevention goals of EAPA and TFTEA in general. Congress acted to equip CBP with improved tools for addressing widespread illegal evasion of antidumping ("AD") and countervailing ("CV") duty orders. These tools, in turn, were designed to assist the agency in preventing fraudulently-traded goods from entering the U.S. market in circumvention of AD/CV orders, thereby insuring that vulnerable domestic industries were not further harmed by unfairly-traded imports.

The remedial provisions of EAPA, as set forth at 19 C.F.R. § 165.24 (**Interim measures**) and 19 C.F.R. § 165.28 (**Assessments of duties owed; further actions**), appear to be limited in scope so as to be applicable only to entries for imports that are already in the stream of U.S. commerce. The final provision of the *Interim Regulations* reserves the authority of CBP and other government agencies to take additional investigations or enforcement actions related to the cases covered in EAPA proceedings, but the EAPA administrative process itself fundamentally looks backward. Thus, in at least some circumstances, an EAPA investigation may result in the closing of the stable door only after the horses have already bolted.

Nevertheless, EAPA investigations are a substantial step forward in meaningfully addressing illegal evasion of AD/CV orders inasmuch as these proceedings establish a public platform for finding that imported merchandise has, in fact, entered the U.S. market through evasion. The results of CBP's investigations will provide invaluable assistance to the trade community in recognizing and avoiding evasion schemes and will improve the informed compliance of importers and other supply chain participants. But these benefits will only be enjoyed if CBP issues public notices of its actions.

CBP's own website recognizes the importance of publication. CBP explains that the agency issues "binding advance rulings and other legal decisions in connection with the importation of merchandise into the United States," as these rulings "provide the international trade community with a transparent and efficient means of understanding how CBP will treat a prospective import or carrier transaction."[2] And these rulings are not the only agency documents that are publicly released and broadly disseminated. CBP explains further that:

> With a view to promoting transparency, CBP also makes available to the public various other guidance including the following: the Customs Rulings On-Line Search System (CROSS – a database of published rulings), the Customs Bulletin and Decisions, pertinent Federal Register Notices, CBP Directives and

[2] See https://www.cbp.gov/trade/rulings (last visited Oct. 18, 2016).

> Handbooks, Informed Compliance Publications, and a summary of laws enforced by CBP.[3]

The U.S. shrimp industry's experience is a direct testament to the importance of publication regarding CBP's enforcement actions. In May 2010, CBP issued HQ H034575 – a letter from Myles B. Harmon, Director, Commercial and Trade Facilitation Division to John S. Porter, Area Port Director, Savannah, Georgia. The letter responded to a request for internal advice from Mr. Porter, dated July 23, 2008, regarding the application of a scope determination from the U.S. Department of Commerce ("Commerce") related to "dusted" shrimp. As described in the letter, between May and June 2007, an importer named Royal Hunan Seafood "imported multiple shipments of frozen warmwater shrimp." CBP selected twelve of these shipments for targeted inspection and conducted laboratory analysis of four samples of the frozen shrimp to evaluate whether the shipments qualified for exclusion from the AD order on shrimp as "dusted" shrimp. The analysis of the samples showed, among other things, that there were indications that the shrimp had been frozen prior to the addition of flour and, as such, did not meet the definition of the excluded "dusted" shrimp product. The letter issued by Mr. Harmon summarized the evidence presented by Royal Hunan Seafood contesting CBP's conclusions, provided the basis for the conclusion that Royal Hunan Seafood had failed to make a *prima facie* case sufficient to establish that the shrimp was correctly described as "dusted" shrimp, and described why the agency's inspections and laboratory analysis "were sufficient for purposes of determining whether the imported merchandise constituted frozen dusted shrimp."

The letter issued by CBP in May 2010 (HQ H034575) provided specific details regarding agency enforcement actions that curtailed widespread evasion of the AD orders on shrimp. In doing so, HQ H034575 provided background and context for the summary of CBP's operations that appeared in a report of the U.S. Government Accountability Office ("GAO") published in February 2009. In that report, the GAO observed that roughly two-thirds of the entries targeted failed to meet the criteria required to qualify for exemption from payment of AD duties as "dusted" shrimp:

> In 2007, the NTAG that works on seafood fraud issues also helped identify another scheme importers were using in their attempt to evade antidumping duties on Chinese shrimp. Under this scheme, importers provided CBP with fraudulent information on the product type to evade antidumping duties. A precursor to breaded shrimp called "dusted shrimp" was exempted by the Department of Commerce from the antidumping duty order on imported Chinese shrimp. On the basis of allegations from the U.S. shrimp industry, CBP initiated an intensive examination and sampling operation to determine whether importers were bringing in shipments of falsely declared dusted shrimp to avoid the antidumping duties on Chinese shrimp. Over the course of a 90-day period, CBP found that of the 81 alleged dusted shrimp entries examined and sampled, approximately 64 percent of the shipments did not meet the criteria to qualify as dusted shrimp. The

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[3] Id.

> potential loss of trade revenue from these fraudulent dusted shrimp shipments was approximately $5 million. Extrapolating back to when the antidumping duty order first became effective in 2005, CBP concluded that the importers caught importing these fraudulent dusted shrimp imported approximately $117 million worth of potentially fraudulent dusted shrimp with a possible loss of trade revenue from the uncollected antidumping duties of $132 million.[4]

In September 2010, in response to a court challenge filed by the Ad Hoc Shrimp Trade Action Committee and with an appreciation of the broad abuse of the "dusted" shrimp exclusion, Commerce's determination that "dusted" shrimp was, in fact, within the scope of the AD orders on shrimp was published in a Federal Register notice.[5] With the notice's publication, one major vehicle for evasion of AD duties was eliminated. Moreover, by the time that the Federal Register notice was published it was impossible for the shrimp importing community to deny that significant fraud had been occurring in the market through abuse of the "dusted" shrimp exclusion. In sum, CBP's enforcement efforts not only addressed prior circumvention of trade remedies, but the publication of those efforts assisted in preventing further evasion.

The U.S. shrimp industry continues to face concerted, well-organized efforts to evade AD orders by shrimp importers and their suppliers. In response, SSA has coordinated with several federal agencies in addition to CBP – U.S. Immigration and Customs Enforcement, Homeland Security Investigations, Enforcement and Compliance of the International Trade Administration of the U.S. Department of Commerce, the Office of Law Enforcement of the National Oceanic and Atmospheric Administration Fisheries, and the Office of Criminal Investigations of the U.S. Food and Drug Administration – to address the criminal networks that facilitate the evasion of AD/CV duties and related trade fraud. Beyond "dusted" shrimp, since the imposition of the AD orders on frozen shrimp imports in 2005, these agencies have successfully countered evasion of payment of AD duties through transshipment of Chinese-origin shrimp through Indonesia, misclassification of entries as not subject to the AD orders, and, most recently, the transshipment of Chinese-origin shrimp through Malaysia. These agencies have also investigated and identified the participants in past evasion schemes, such as the transshipment of shrimp subject to AD duties through Cambodia.

The success of these agencies in counteracting evasion of AD duties and shrimp trade fraud in general has been essential in maintaining the integrity of the AD orders on shrimp. Ultimately, however, the effectiveness of the trade remedy is contingent upon whether participants in the imported shrimp supply chain will tolerate fraud. Apologists for the shrimp

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[4] See U.S. Government Accountability Office, Seafood Fraud: FDA Program Changes and Better Collaboration Among Key Federal Agencies Could Improve Detection and Prevention, GAO-09-258 (Feb. 2009) (footnote omitted).

[5] See U.S. Department of Commerce, Certain Frozen Warmwater Shrimp from Brazil, India, the People's Republic of China, Thailand, and the Socialist Republic of Vietnam, 75 Fed. Reg. 53,947 (Sept. 2, 2010) (Notice of Amended Final Determinations of Sales at Less Than Fair Value Pursuant to Court Decision).

importing industry continue to peddle the fiction that major retailers, restaurant chains, and food distributors have taken action to eliminate fraudulently-described shrimp from their sourcing. Investigations into the disposition of fraudulently-described shrimp, however, demonstrate that this merchandise is not destined for niche markets and customers. Instead, the evidence demonstrates that fraudulently-traded shrimp moves easily in traditional streams of commerce, alongside to and in competition with legitimately-traded shrimp imports. Indeed, the investigations of federal agencies found that when Cambodia miraculously spontaneously developed a commercial shrimp farming, processing, and exporting industry, this "Cambodian" shrimp was carried in a major grocery store chain in the Midwest. Similarly, when large quantities of cheap, peeled (and short-weighted) "Malaysian" shrimp inundated the market, documents submitted in one civil case litigated in federal court indicated that this shrimp became the basis of a marketing campaign for a restaurant chain in California. In that civil case, when the purchaser was asked during a deposition why he mistakenly wrote on a purchase order that the shrimp he was buying was from China and not, as indicated by the supplier, from Malaysia, the purchaser explained: "I was ordering 51/60 P&Ds. I didn't care the brand. I didn't care the country." The purchaser further described why it was so important to acquire the "Malaysian" shrimp, as it was for a "big restaurant chain that had a commercial that was running on TV and, you know, this was all purchased for that ad that was coming out."

The continued existence of a market for fraudulently-described imported shrimp, entered into the United States through evasion, is contingent upon plausible claims of ignorance as to the evasion that facilitates the trade in the first instance. In the absence of public disclosures of enforcement activities, institutional importers, distributors, and purchasers of imported shrimp can point to another party as being responsible for the representations of the merchandise: for a purchaser, the reliance is on the distributor; for the distributor, the reliance is on the importer or broker; for the importer or broker, the reliance is on the foreign exporter. This encourages market participants to run sales through multiple entities, each disclaiming knowledge of the manner in which the merchandise entered the country. The lack of knowledge, based on the absence of public findings, as to the degree to which evasion takes place fuels the marketplace. Thus, substantial quantities of peeled "Malaysian" shrimp found their way into U.S. commerce after:

1. being initially sold by a Chinese company affiliated with a large Chinese seafood conglomerate;

2. through a company incorporated in the United States to act as a subsidiary of that Chinese company; and

3. were entered into the United States through another company incorporated in the United States by the Chinese company to act as the importer of record; and

4. were subsequently sold to another seafood broker/distributor pursuant to a written agreement between the U.S. subsidiary of the Chinese company and a U.S. entity that specialized in sales of honey and frozen shrimp; and

5. were thereafter sold from the seafood broker/distributor to another seafood broker/distributor; and

6. ultimately sold to a restaurant chain that was under no obligation to inform its customers of the origin of the shrimp the restaurant was serving.

Publication of CBP's actions and findings in EAPA investigations materially alters this dynamic. Findings by the agency, based on substantial evidence, that merchandise entered the United States through evasion puts the trade community on notice that reasonable care should be taken to avoid similar sourcing strategies. More importantly, CBP's findings inform consumers that hard questions should be asked of those selling them merchandise regarding what steps have been taken to remove fraudulently-traded goods from their supply chain.

In circumstances where investigations are criminal in nature, the absence of public disclosures is appropriate. However, here, the *Interim Regulations* governing the EAPA proceedings already contemplate that notice will be provided of agency actions and determinations. The recipients of those notices – the parties to the investigation – are not in any way constrained by the *Interim Regulations* from publicizing these notices on their own. Thus, the only question presented for CBP is the degree to which notices will be publicized by the agency itself. SSA believes that Congress's intent to prevent evasion of AD/CV duty orders should lead CBP to amend the *Interim Regulations* to provide for the publication of agency actions and determinations in EAPA proceedings.

Finally, separate and apart from all other considerations, the publication of notices of CBP's actions and determinations will promote the interests of the agency. If nothing else, CBP should publicize its administrative actions in order to create a public record of the substantial work the agency undertakes in enforcement of AD/CV orders. SSA is grateful to CBP for the agency's extraordinary efforts to enforce the trade remedy on unfairly-traded shrimp. SSA believes that CBP's work on enforcement is frequently unrecognized and misunderstood. The EAPA proceedings establish an administrative framework that already contemplates the issuance of notices of agency action. The interests of the agency, as well as those of the trade community at large, are best served by broad publication. The *Interim Regulations* should be amended to provide for publication, but nothing within the *Interim Regulations* prevents CBP from publicizing notices prior to any amendment. CBP should take advantage of current proceedings as opportunities to determine the best and most effective manner by which to publicize notices.

Thank you for any consideration you are able to give to these comments.

Sincerely,

John Williams
Executive Director